4-6-2015

Navo v. Bingham Memorial Hosp. Appellant's Brief Dckt. 42540

IN THE SUPREME COURT OF THE STATE OF IDAHO

LUCIA NAVO, SERENA and and NICOLE NAVO, individuals, Plaintiffs/Appellants, vs. BINGHAM MEMORIAL HOSPITAL, an Idaho corporation, RYAN SAYRE, an individual, Defendants/Respondent.	)	Bingham Co. Case No. CV-2010-2965 Idaho Supreme Court Docket No. 42540-2014

APPELLANTS' BRIEF

Appeal from the Seventh Judicial District Court
of the State of Idaho, in and for the County of Bingham

Honorable David C. Nye, District Judge, Presiding

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STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiffs, Lucia Navo, Serena Navo, and Nicole Navo (Navos), appeal the District Court's decision to dismiss defendant/respondent Bingham Memorial Hospital (BMH) from their wrongful death claims stemming from the death of Ellery Navo after he had received surgery at BMH to replace a rod in an infected broken ankle. Navos allege that the District Court erred in excluding their hospital expert on summary judgment, and then later dismissing BMH entirely from the case despite factual issues as to the hospital's potential liability under the doctrine of apparent authority.

COURSE OF PROCEEDINGS BELOW

On December 29, 2010, Navos filed their Complaint alleging, in four counts, the right to recover damages from Sayre[1] and BMH for the wrongful death of their husband and father. R., Vol. 1, pp. 1, 26–31.[2] Sayre answered denying liability on July 18, 2011. R., Vol. I, pp. 2, 32.

On August 24, 2011, defendants Sayre and Monroe filed a Motion for Summary Judgment. R., Vol. I, p. 3. Since the case against Monroe has been dropped, and the case against

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[1] The Complaint named not only nurse anesthetist Sayre as a defendant, but also nurse anesthetist Matthew Monroe. In the course of discovery it became clear that although both anesthetists cared for Ellery Navo during the surgery, the damage to Ellery was complete before Monroe took over from Sayre. Thus, plaintiffs did not pursue the case further against Monroe.

[2] The Clerk's Record as provided to the plaintiffs consisted of three (3) electronic files, each having pages separately numbered beginning with page 1. Plaintiff has identified those files in this brief as: (1) the file entitled "Clerk's Record on Appeal," which consists of pages 1–1099, as Volume I; (2) the file entitled "Clerk's Supplemental Record on Appeal," which consists of pages 1–14, as Volume II; and (3) the file entitled "Supplemental Clerk's Record on Cross Appeal, which consists of pages 1–236, as Volume III.

Sayre has been settled, no further discussion of that motion for summary judgment follows except as relevant to BMH.

BMH never filed an Answer to the Complaint. Instead, it filed a Motion for Summary Judgment on November 17, 2011, supported by the Affidavit of Cynthia Christensen, the Affidavit of Dan Cochran, and a brief. R., Vol. I, pp. 4, 40–41, 52–56, 57–60, 42–51.

Pursuant to a scheduling order entered by the court on December 19, 2011, R., Vol. I, pp. 93–94, on January 18, 2012, the Navos filed an Affidavit of Counsel, the Affidavit of Samuel H. Steinberg, and a brief in opposition to the Motion for Summary Judgment. R., Vol. I, pp. 6, 95–255, 256–268, 295–312.

After the matter was fully submitted, on February 27, 2012, the trial court issued its Decision: Defendants' Motion for Summary Judgment & Motions to Strike, as well as a Judgment thereon. R., Vol. I, pp. 7, 397–416. The court's decision struck the entire Affidavit of Samuel H. Steinberg and granted summary judgment to BMH, as well as to Sayre and Monroe.

Navos moved for reconsideration of the court's decision on March 12, 2012, supported by Supplemental affidavits of Dr. Peter Schulman and Dr. Samuel Steinberg. R., Vol. I, pp. 8, 417–436. On July 24, 2012, the District Court issued its Decision on Plaintiffs' Motion to Reconsider and Defendants' Motions to Strike. R., Vol. I, pp. 494–516. The court granted Navos' motion to reconsider as to Sayre and BMH on Count One of the Complaint, but upheld its prior decision on summary judgment as to Counts Two, Three and Four. R., Vol. I, p. 515.

Thereafter, on March 20, 2013, BMH moved for reconsideration of the court's July 24, 2012, decision leaving open Count One as to BMH based on the theory of apparent authority. R.,

R., Vol. I, pp. 589–590. That motion was renewed two weeks later on April 4, 2013, and with such renewal BMH filed a memorandum and the affidavits of counsel, and of Jeff Daniels. R., Vol. I, pp. 695–696, 807-808. Navos offered the affidavit of Lucia Navo in opposition to BMH's renewed motion. Vol. I, pp. 946-851. On April 17, 2013, only two days before the April 19, 2013, hearing scheduled on the motion, BMH offered the affidavit of Janelle K. Larsen in support of its motion. R., Vol. I, pp. 957-970. Navos filed a "Motion to Strike Untimely Affidavits" on April 18, 2013. On May 31, 2013, the court issued its Decision on Motions granting BMH's motion for reconsideration, deciding that plaintiffs had failed to adequately plead the legal theory of apparent authority and that, even if it had properly pled that theory, BMH was entitled to summary judgment on the issue. R., Vol. I, pp. 1015–1024. This decision resolved all claims involving BMH against the Navos, but left open the matters against Sayre for trial. The court declined to enter a Rule 54(b) Certificate of Final Judgment as requested by BMH. R., Vol. I, p. 1040.

As the result of a settlement between Sayre and Navos, on June 18, 2014, the parties filed a Stipulation for Dismissal With Prejudice of Plaintiffs' Claims Against Defendant Ryan Sayre. R., Vol. I, pp. 1070–1071. That having resulted in a resolution of all claims of all parties, the court entered final judgment dismissing all claims against all parties, with prejudice, on August 4, 2014. R., Vol. I, p. 1074.

Forty-two days later, on September 15, 2014, Navos filed their Notice of Appeal as against the defendant, Bingham Memorial Hospital, only. R., Vol. I, pp. 1076–1078.

STATEMENT OF FACTS

BMH's motion for summary judgment focused exclusively on facts relating to the standard of care and its compliance or non-compliance with that standard. But the background facts have never been contested.

On December 15, 2008, Ellery Navo, a 36 year-old Native American member of the Shoshone-Bannock Tribe, was admitted into Bingham Memorial Hospital for treatment of an infected ankle that had been surgically repaired the previous month. On December 19, 2008, the decision was made to surgically remove the rod that had been inserted to repair Ellery's ankle. That surgery took place the following day at approximately 12:30 p.m.

Sayre administered the anesthesia through a procedure referred to as a "spinal." Shortly after the anesthesia was administered, Ellery's blood pressure, heart rate, and oxygen levels experienced a severe drop. He also lost control of his own breathing, and Sayre then converted the spinal anesthesia to general anesthesia. It was some time before Ellery's systems were controlled and brought back to normal levels. After Ellery's systems were stabilized, Monroe took over anesthesia care of Ellery, but at the end of the surgery Monroe was unable to revive Ellery from the anesthesia and he remained unconscious and non-responsive until his death on December 30, 2008. R., Vol. I, p. 298.

Ellery Navo was survived by his spouse, Lucia Navo, and by two teenage daughters, Nicole and Serena Navo, who are the plaintiffs in this case.

The crux of Navos' complaint regarding the cause of Ellery's death is set forth in the Affidavit of Dr. Peter Schulman, a board certified anesthesiologist as well as an attending

physician and assistant professor of anesthesiology at Oregon Health & Science University in Portland, Oregon. R., Vol. I, p. 270. Dr. Schulman gave his opinion that the care provided to Ellery Navo in December 2008 failed to meet the standard of health care practice in Blackfoot, Idaho. Among other problems, Dr. Schulman noted that:

- Except for the word "spinal" listed on the Pre-Anesthesia form and what was listed at the top of the form, the preoperative anesthesia evaluation and anesthesia plan did not accurately reflect or take into account the full nature and extent of Ellery Navo's pre-surgery co-morbid medical conditions.
- Sayre did not discuss the case with the surgeon, Dr. Woods, or any other physician, anesthesiologist, or CRNA prior to the surgery.
- Sayre's discussion with Ellery Navo about his medical history was brief, and he did not speak with Ellery's wife, children, or other relatives.
- It was unclear whether Sayre reviewed Ellery's chart or medical records prior to the procedure, and if he did, it was a cursory and superficial review.
- Critical problems such as Ellery's morbid obesity, risk factors for obstructive sleep apnea, and recent fever were not noted on the pre-anesthesia form.
- Ellery was administered a relatively high dose Propofol infusion (a powerful sedative-hypnotic typically used for sedation and/or for the induction of general anesthesia), the administration being at a fixed rate and not titrated to effect.
- within five minutes after administration of the "spinal," Ellery experienced a profound drop in blood pressure (hypotension) and in heart rate (bradycardia) that

lasted for a significant period of time. Ellery became unresponsive, although the length of time that he was unresponsive was not documented.

- in addition, Ellery's blood oxygen saturadion dropped (hypoxemia), and again this was not accurately recorded on the anesthetic record. One record reflected "mid 70's and low 80's" and another record showed a consistent "99%".
- The Propofol infusion was never down-titrated or turned off during the period of hypoxemia.
- After Ellery's oxygen saturation dropped, Sayre administered Propofol as a "bolus" (a rapid intravenous injection), although this was not recorded.
- To treat the hypotension and bradycardia, Sayre administered several doses of Ephedrine and one small dose of Robinul, but did not administer ephinephrine.
- Sayre did not communicate with the surgeon other than to report Ellery's drop in heart rate and blood pressure, and he did not call other anesthesia providers for additional help.
- This history reflects numerous unacceptable errors.

In summary, Dr. Schulman opines, "the cascading sequence of adverse events that ensued in this case were the direct result of inadequate preparation for anesthesia, a poorly designed and initiated anesthetic plan, and an inadequate response to the instability that ultimately occurred. This combination of factors, in the aggregate, resulted in Mr. Navo's death." R., Vol. I, pp. 274–282.

As noted, BMH's motion for summary judgment focused on whether the hospital could be held liable for Ellery Navo's death. In support of its motion, the hospital offered the two page affidavit of its chief nursing officer Cynthia Christensen, who essentially testified that the "nurses" responsible for Mr. Navo's care "complied with the applicable local community standard of health care practice" but that "nurses are not involved in the decision-making process relative to" anesthesia care. R., Vol. I, pp. 50-53. BMH also offered the affidavit of its COO Dan Cochran who claimed that anesthesia services are provided at the hospital by nurse anesthetists that are employed by Blackfoot Anesthesia Services, LLC. R., Vol. I, pp. 57-59.[3]

In response, Navos offered the affidavit and report of Dr. Samuel Steinberg. R., Vol. I, pp. 256-268. Dr. Steinberg's experience and background included numerous years as a director and hospital administrator, an MBA in health care administration, a Ph.D. in Organization & Management, and many years experience on a university faculty. R., Vol. I, pp. 259-264.

Dr. Steinberg's affidavit and report expressed his opinion that the care provided to Ellery Navo by BMH and its staff, contractors, and employees violated certain specific Joint Commission standards, which was a failure of the standard of health care practice in the community in which BMH serves and operates. R., Vol. I, p. 266. Because the Joint Commission standards are specifically adopted by regulations of the Idaho Department of Health and Welfare, and are

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[3] BMH also filed a Second Affidavit of Jennifer Brizee and an Affidavit of Judith Nagel on January 20, 2012, the same day as the hearing held on the motion. R., Vol. I, pp. 321– 328, 355–358. Seven days later, on January 27, 2012, BMH filed the Affidavit of Tina Cobia. R., Vol. I, pp. 371–380. The District Court did not refer to any of these woefully late affidavits in its Memorandum Decision. R., Vol. I, pp. 397–429.

specifically applicable by law to hospitals throughout the State, Dr. Steinberg applied those standards to the conduct of BMH, especially in relation to the care provided to Ellery Navo.

In particular, but not exclusively, he reported:

- BMH lacked a required contract with Blackfoot Anesthesia Services, which provided Sayre as a nurse anesthetist to BMH and its patients.
- BMH lacked a required collaboration agreement between Blackfoot Anesthesia Services' nurse anesthetists, such as Sayre, and a qualified physician, dentist or podiatrist.
- BMH lacked the required Chief of Anesthesia/physician director of anesthesia services.
- BMH lacked required policies and procedures, approved by the physician director of the anesthesia service, to guide the hospital's anesthesia program.

R., Vol. I, pp. 266–268.

In short, BMH had no written policies, requirements, contracts, or standards to govern the administration of anesthesia in its hospital. BMH had done essentially nothing to ensure that anesthesia provided by nurse anesthetists at its hospital was done at any level of competence. Instead, it attempts to rely exclusively on Blackfoot Anesthesia Services to perform all of its responsibilities in that regard. As a result, Dr. Steinberg's opined that BMH violated the following Joint Commission Standards:

1. LD.1.10. "The hospital identifies how it is governed. The hospital has governance with ultimate responsibility and legal authority for the safety and quality of care, treatment, and services."
2. LD.1.30. "The hospital complies with applicable law and regulation."
3. LD.2.20. "Each hospital program, service, site, or department has effective leadership."
4. LD.3.50. "Care, treatment, and services provided through contractual agreement are provided safely and effectively."

Id.

Dr. Steinberg indicated his knowledge with regard to the local standard of care as follows:

> "These Joint Commission standards are widely accepted in the United States as the standard of care for the provision of inpatient hospital care, and describe the accountability and responsibility of hospital leaders in the delivery of care at their facilities. Joint Commission standards require that hospital leaders establish a governance structure and management systems to oversee that appropriate rules, regulations, infrastructure, credentialing, and communication processes are in place to deliver high quality and safe care to their patients. The hospital is further required to establish systems to monitor the effectiveness of care and to correct any deficiencies. Ultimately, the hospital is responsible for the oversight of all professional services provided by its medical staff, employees, and any others that it credentials or contracts with to practice at the hospital. Joint Commission standards are also used by the federal Centers for Medicare and Medicaid to determine compliance with the requirements of these programs, and are also used and accepted as the standard of care for hospital licensure in many states, including Idaho, and Bingham Memorial Hospital is accredited by the Joint Commission and must therefore comply with their standards. I have also spoken with Judith Nagel, RN, Associate Director of the Idaho State Board of Nursing on January 11, 2011 to affirm that the community standards in rural hospitals in Idaho regarding nurse anesthesia programs is similar to standards in place across the country that I am familiar with."

R., Vol. I, p. 266.

Navos also offered the Affidavit of Counsel attaching a number of written discovery responses and deposition testimony that demonstrated, among other things, that:

1. BMH's website lists Steve McClellan as the "Manager" of the "Anesthesia Department." R., Vol. I, p. 100. It does not indicate that Mr. McClellan is the owner and manager of Blackfoot Anesthesia Services, LLC, leading the public to believe that he is an employee and a part of hospital management (its Director of Anesthesia Services). R., Vol. I, pp. 109, 111. This also implies that the hospital provides anesthesia services, not an independent contractor.
2. All of the anesthesia forms, *i.e.* the consent forms, pre-anesthesia forms, and anesthesia records, are all under BMH's letterhead. R., Vol. I, pp 292–295.
3. BMH has historically engaged in an aggressive marketing and ad campaign, in print, on the radio, tv and billboards in the area encouraging people throughout the region to come to its hospital for services, and also claiming that it offered high quality health care services. R., Vol. I, pp. 96–97, 947.
4. BMH has not publically indicated that its support services, including anesthesia care, are not provided by the hospital. Id.

In support of its Motion for Reconsideration (re: apparent authority), BMH offered an affidavit of its COO, Jeff Daniels, who again claimed that the hospital does not bill for anesthesia services. R., Vol. I, pp. 807–809. BMH also offered the (late) Affidavit of Janelle K. Larsen attaching a number of "Conditions of Admission Forms" allegedly signed by Ellery Navo. R.,

Vol. I, pp. 957–972. None of those forms are dated at the time that Mr. Navo was admitted to the hospital for the ankle surgery that ultimately lead to his death. Id.

At no point has BMH disputed the substance of the evidence and claims brought by Navos in the case. Instead, it has consistently taken the position that it had no part in or responsibility for supervising, overseeing, or providing anesthesia services it its hospital. The District Court excluded Dr. Steinberg solely on the basis that his testimony lacked foundation to show that he was familiar with the local standard of care as required under IC § 6-1012-13 (discussed *infra*).

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in holding that Dr. Samuel Steinberg lacked sufficient knowledge of the local standard of care, as required under Idaho Code §§ 6-1012–1013?

2. Did the District Court err in determining on summary judgment that there was insufficient support for Navos' claim that Sayre was acting as BMH's agent while performing anesthesia services on Ellery Navo, under the theory of apparent authority?

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO REVIEW.

The standard of review as it pertains to a review of a decision on summary judgment, particularly as it relates to the qualification of an expert witness, was succinctly summarized by this Court in the recent decision of *Mattox v. Life Care Centers of America, Inc.*, ____ Idaho ____, 337 P.3d 627, 631–32 (2014):

> "'On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion.' *Arregui v. Gallegos-Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012). Summary judgment is proper when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' I.R.C.P. 56(c).
>
> "When considering 'whether the evidence shows a genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences in favor of the nonmoving party.' *Arregui*, 153 Idaho at 804, 291 P.3d at 1003.
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> "'The admissibility of expert testimony, however, is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment.' *Id.* With respect to the threshold issue of admissibility, '[t]he liberal construction and reasonable inferences standard does not apply. . . .' *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002). Instead, '[t]he trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible.' *Id.*
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> "'A district court's evidentiary rulings will not be disturbed by this Court unless there has been a clear abuse of discretion.' *McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC*, 144 Idaho 219, 222, 159 P.3d 856, 859 (2007). In applying the abuse of discretion standard, we ask three questions: '(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.' *Id.* at 221–22, 159 P.3d at 858–59."

Id.

II. DR. STEINBERG'S TESTIMONY, TAKEN AS TRUE, MEETS THE THRESHOLD QUALIFYING HIM AS AN EXPERT UNDER IDAHO CODE §§ 6-1012–1013.

The District Court excluded Dr. Steinberg's affidavit for the sole reason that his testimony did not adequately lay a foundation to suggest that he had the requisite familiarity with the local standard of care, as required under Idaho Code §§ 6-1012–1013. R., Vol. I, p, 412. In the District Court's initial Memorandum Decision, relying in large part on *Schmechel v. Dille*, 148 Idaho 176, 219 P.3d 1192 (2009) (which does not at all address the qualification of experts under Idaho Code §§ 6-1012–13) the District Court held that Dr. Steinberg could not rely upon the IDAPA rules to establish familiarity with the local standard of care. R., Vol. I, p. 411. The District Court also parsed Dr. Steinberg's affidavit to suggest that his consultation with Judith Nagel did not necessarily include information whether the uniform standards of nurse anesthesia care at hospitals throughout Idaho included BMH.[4] R., Vol. I, pp. 409-411. Essentially, the District Court held that his affidavit did not contain the magic words "including Bingham Memorial Hospital in Blackfoot, Idaho." R., Vol. I, p. 410.

On Navos' Motion to Reconsider, wherein Navos pointed out holdings in *Suhadolnik v. Pressman*, 151 Idaho 110, 114–115, 254 P.3d 11, 15–16 (2011) that suggested Dr. Steinberg could rely upon governmental regulations for the local standard of care, the District Court parsed Dr. Steinberg's affidavits further to suggest that the rules and regulations relied upon by Dr. Steinberg did not have anything to do with the "physical administration of health care services." R., Vol. I, pp. 503–505. However, the District Court does not specifically indicate how any of the

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[4] The District Court erroneously held that Dr. Steinberg never identified BMH as a "rural hospital," which in fact he did. Dr. Steinberg specifically noted that BMH is listed as a "critical access hospital," which by federal regulation must be a rural hospital. R., Vol. I, p. 427 ¶ 4.

many blatant violations of the Joint Commission standards (adopted by Idaho in its IDAPA rules) *do not* specifically apply to the "physical administration of health care services." Id.

Since the issuance of the District Court's decisions, the Idaho Supreme Court has addressed this particularly vexing issue, *i.e.*, an out-of-state expert's avenues to obtain the requisite familiarity with the local standard of care to qualify as an expert witness. In its recent decision in *Mattox v. Life Care Centers of America, Inc.*, the Court reiterated a framework for such qualification, emphasizing that it should not necessarily be a "static," but rather a "common sense" approach:

> "The guiding question is simply whether the affidavit alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care. In addressing that question, courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard, and determine— employing a measure of common sense—whether those grounds would likely give rise to knowledge of that standard. The obligation to demonstrate actual knowledge of the local standard of care is not intended to be 'an overly burdensome requirement . . . .' *Frank v. E. Shoshone Hosp.*, 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988). Nor is the standard static and firmly rooted in past medical practices. Standards of care are sensitive to evolving changes in the way health care services are delivered in the various communities of our State. Indeed, the Court has recognized that 'governmental regulation, development of regional and national provider organizations, and greater access to the flow of medical information,' have provided 'various avenues by which a plaintiff may proceed to establish a standard of care . . . .' *Suhadolnik v. Pressman*, 151 Idaho 110, 121, 254 P.3d 11, 22 (2011)."

Mattox v. Life Care Centers of America, Inc., *supra*, 337 P.3d at 633.

In applying this analysis, Dr. Steinberg did establish the foundation for his testimony necessary to qualify him as an expert under Idaho Code §§ 6-1012–1013. In support of his opinion, he cited several Idaho statutes and the Idaho Administrative Code, which suggests that all hospitals in Idaho are subject to the nurse anesthesia provisions under the Joint Commission standards, as well as the standards set forth by the Council on Certification of Nurse Anesthetists

or the Council on Recertification of Nurse Anesthetists.[5] R., Vol. I, pp. 265-268. That alone was likely enough for him to qualify as an expert under the *Mattox* analysis. However, he further consulted with an Idaho official responsible for oversight of the nursing requirements in hospitals, Judith Nagel, to ensure that there were no exceptions to the rule, *i.e.* that "rural hospitals" such as BMH did not have to comply with all of the requirements.[6] R., Vol. I, p. 266. Ms. Nagel also reinforced his understanding that there must be collaboration between the CRNA and a qualified physician. R., Vol. I, p. 267. In a supplemental affidavit, Dr. Steinberg again reiterated that the results of his investigation made it abundantly clear that BMH is subject to the standards set forth under law, which include the Joint Commission standards. R., Vol. I, p. 428.

Next, Dr. Steinberg clearly established the nexus between the Joint Commission and other standards and the provision of health services in the form of anesthesia care. In essence, Dr. Steinberg pointed out the abysmal failures of BMH to have any kind of oversight, guidance, policies, procedures, or agreements between the hospital and the nurse anesthesia services (and the physicians performing the surgeries). R., Vol. I, p. 267. As a result, BMH had absolutely no safety or monitoring standards in place, no performance expectations, no assurance that the hospital had the necessary trained staff, equipment, and policies, procedures, and facilities "in

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[5] In particular, Dr. Steinberg cited IDAPA 16, Title 13, Chapter 14, IDAPA 23, Title 01, Chapter 01, Idaho Code § 54-1402. R., Vol. I, p. 265.

[6] Ms. Nagel is the Associate Director of the Idaho State Board of Nursing. This agency is the regulatory authority over nurse anesthesia services. R., Vol. I, p. 266 *See* Idaho Code § 54-1402(1)(d)(2). To further assure himself that he was speaking to the appropriate person, Dr. Steinberg communicated with the Idaho Chief of the Department of Health and Welfare Bureau of Facility Standards, Debra Ransom, who confirmed that the Idaho Board of Nursing regulates the provision of nurse anesthesia services in Idaho. R., Vol. I, p. 427, p. 4.

place to care for patients like Mr. Navo."[7] R., Vol. I, pp. 266-67. BMH's failures to fulfil its statutory and regulatory obligations resulted in a dearth of policies and oversight of anesthesia services at its hospital, which resulted in inherent dangers to patients, in particular those in Ellery Navo's condition.

In many respects, this case mirrors the *Mattox* decision. In that case the Idaho Supreme Court held that the trial court abused its discretion in striking the affidavit of an out-of-state nursing expert, Wendy Thomason, who relied in large part upon being "familiar with state or federal regulations governing that (particular) care." *Mattox v. Life Care Centers of America, Inc.*, 337 P.3d at 636. As in this case, Nurse Thomason pointed to "specific state and federal regulations governing the operation of" the facility. Id. In so doing, she cited several IDAPA regulations that govern the "operation of nursing facilities." Id. Dr. Steinberg has done the same here, pointing out essential regulatory requirements ignored BMH, and how those failures ultimately affected Mr. Navo's care.

Dr. Steinberg unequivocally opines that:

> The departures identified above from the mandatory standards of the Joint Commission and the requirements of the State of Idaho adversely impacted the provision of care and treatment for Mr. Navo and, with a reasonable degree of administrative and medical certainty breached the community standard of care owed to him and resulted in his eventual death.

R., Vol. I, p. 268.

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[7] This testimony should also be taken in context with that of Dr. Peter Schulman, whose affidavit was ultimately allowed by the Court, who indicated in vivid detail the systematic failures with regard to Mr. Navo's anesthesia care, which ultimately caused his death. R., Vol. I, pp. 273–282. This was particularly true given Mr. Navo's complicated health conditions. Id.

This statement alone, *taken as true,* without question makes the connection between the violation of rules and the impact on health care services. As such, the District Court abused its discretion by suggesting that Dr. Steinberg's testimony did not involve the "physical administration of health care services." R., Vol. I, p. 507. Its decision to strike Dr. Steinberg's affidavit, effectively dismissing Count III of Navos' complaint against BMH, should be reversed.

III. THE DISTRICT COURT ERRED IN DETERMINING ON SUMMARY JUDGMENT WHETHER BMH WAS LIABLE FOR THE CRNA'S CONDUCT UNDER THE DOCTRINE OF APPARENT AUTHORITY.

A. There Were at Least Disputed Issues of Fact that Supported Navos' Claim of Apparent Authority.

After striking Navos' hospital expert, Dr. Steinberg, the District Court at first allowed Navos' claims against BMH on Count One to proceed under an agency theory, that is, that the CRNAs had apparent authority to act for BMH in providing anesthesia services at the hospital. R., Vol. I, p. 515. Later, after BMH filed its Motion to Reconsider, the District Court ruled as a matter of law and undisputed fact that Sayre was not BMH's agent, either actually or under the theory of apparent authority, taking that determination out of the jury's hands. Viewing the evidence in the light most favorable light to the Navos, as the non-moving party, that ruling was an error.

The Idaho Supreme Court has previously weighed in with regard to apparent authority *as it pertains to support services at hospitals. See, Jones v. Health South Treasure Valley Hosp.*, 147 Idaho 109, 206 P.3d 473 (2009). Under *Jones*, the Idaho Supreme Court overturned the trial court's decision to dismiss the hospital defendant, Treasure Valley Hospital (TVH), for vicarious

liability of cell saver technicians and the anesthesiologists, both of which were independent contractors performing support services at the hospital. *Id.*, 147 Idaho at 111–112, 206 P.3d at 475–476. In the Factual Background section of its opinion, the Court noted that TVH's consent form did not indicate the cell saver technicians' status as independent contractors. *Id.* There is no reference to what was contained in the form with regard to the anesthesiologists, and at no other point does the opinion reference the consent form as relevant to its decision. The Court remanded the case to the trial court to present the question of apparent authority to the jury. *Id.*

The *Jones* Court discusses the doctrine of apparent authority at length as it applies to support services provided to hospitals by independent contractors:

> "A principal is immune from liability for the negligence of an independent contractor, or that of its employees, in the performance of the contracted services. However, there are exceptions to the general rule, one being the exception referred to as 'apparent authority.' Liability is imputed to a principal who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants." *Id.*, 147 Idaho at 112, 206 P.3d at 476.

The authority is established when it is traceable to the principal's manifestations:

> "When determining liability in a situation when an agency relationship is alleged, 'apparent authority' is defined as the power held by an agent or other actor to affect a principal's legal relationship with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* at 114, 478.

A hospital may be vicariously liable for other individuals performing support services, regardless of whether they were directly employed:

> "A hospital may be found vicariously liable for the negligence of other individuals performing support services necessary to complete the patient's treatment. If a patient does select a particular physician to perform certain procedures within the hospital setting, this does not alter the fact that a patient may nevertheless still reasonably rely upon the hospital to provide the remainder of the support services necessary to complete the patient's treatment. Generally, it is the hospital, and not

> the patient, which exercises control not only over the provision of necessary support services, but also over the personnel assigned to provide those services to the patient during the patient's hospital stay. To the extent the patient reasonably relies upon the hospital to provide such services, a patient may seek to hold the hospital vicariously liable under the apparent agency doctrine for the negligence of personnel performing such services even if they are not employed by the hospital." *Id.* at 115, 479.

The hospital owes a duty of care through its employees *and* independent staff personnel:

> "Liability extends beyond the hospital/physician context. When a hospital has received a patient, under whatever circumstance, and has undertaken treatment, that patient is owed a duty by the hospital through its employees and staff, including independent staff personnel, to exercise appropriate care to provide for the patient's well-being and to promote his cure. A breach of this duty may expose the hospital to liability in tort . . . Some courts recognize hospital liability under the doctrine of apparent authority when the hospital has established and staffed facilities or departments through which patients receive specialized care from medical professionals with whom they do not have a prior or ongoing relationship-emergency rooms, operating rooms and anesthesiology and radiology departments." *Id.*

The standard for determining apparent authority is "reasonable belief," not "reliance."

> "Furthermore, we find that a standard of 'reasonable belief' rather than 'reliance' more fairly comports with Idaho's prior case law regarding apparent authority . . . We have only required that a person be 'justified in believing' the agent was acting pursuant to existing authority, rather than relying on the agent's services, in order to establish apparent authority. We find no persuasive reasoning for adopting the more stringent standard of reliance for cases where the principal is a hospital." *Id.* at 481, 117.

Finally, in remanding the case for a determination of apparent authority of the hospital over its "independent personnel assigned by the hospital to perform support services," the Court set forth the elements of such claim:

> "1) conduct by the principal that would lead a person to reasonably believe that another person acts on the principal's behalf, *i,e.*, conduct by the principal 'holding out' that the person as its agent, and
>
> "2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal." *Id.* at 116, 480.

In this case the District Court relied almost entirely upon the alleged "Conditions of Admissions Form" as well as the holding in *Vandevelde v. Poppens*, 552 F. Supp. 2d 662 (W.D. Ky 2008)[8] to determine, as a matter of indisputable fact and law, that Ellery Navo had sufficient knowledge to suggest that he was aware that the nurse anesthetists providing anesthesia were not under the direction of the hospital. R., Vol. I, pp. 1020–23.

Since BMH clearly held itself out as providing support services for physicians who provided care at the hospital, the burden is upon the hospital to show that it provided meaningful notice that it did not control those services. The District Court erred by not more closely considering the facts and evidence (or lack thereof) on this point, and should have allowed the question of the hospital's apparent authority to go to a jury.

Navos presented an abundance of evidence to suggest that the hospital held itself out as providing support services, including anesthesia. *See* Statements of Facts, *infra*. This included the intense marketing campaign advertising such services, the hospital forms, including the consent forms, and the listing of a "manager" of an "anesthesia department" (with no reference to an outside company) on its website. This alone should raise an issue of material fact to support the Navos' claim of Sayre's apparent authority under the hospital's provision of anesthesia services. The question then becomes whether the hospital provided admissible and undisputed evidence of meaningful notice, specifically given to its patient, Ellery Navo, to negate the

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[8] It should be noted that the *Vandevelde* does not involve nursing or other support services provided at the defendant hospital, but rather a physician performing emergency room services.

implication inherent in its manner of presenting itself to the public that support services such as anesthesia during surgeries at the hospital were not provided by the hospital.

Under the apparent authority standard of reasonable belief, and given the stringent standard applicable to summary judgments where the facts are construed in a light most favorable to the non-moving party, BMH has failed to negate that implication.

As indicated, the District Court relied almost entirely upon the "Conditions of Admission" form prepared by BMH to establish sufficient notice to Ellery Navo. However, in so doing, the Court made a serious factual error. Ellery Navo was admitted to BMH on December 15, 2008. R., Vol. I, p. 273. However, none of the "Conditions of Admission Forms" submitted by BMH in support of its Motion for Reconsideration contain a signature by Ellery Navo on or near that date. [9] R., Vol. I, pp. 959–970. The only forms provided that have a date are dated many years prior to this admission. R., Vol. I, pp. 960–964. The rest of the forms are undated, giving the court no reason to believe that, on this admission, Ellery Navo was provided any notice whatsoever to counter his reasonable belief that BMH was, like any other hospital, providing all of the support services. R., Vol. I, pp. 966–970. Thus, the District Court's reliance upon these irrelevant documents was improper and insufficient to eliminate the apparent agency established by the Navos' evidence.

This result is particularly apt since, at the time Ellery Navo was admitted on December 15, 2008, he was not admitted for surgery. He was admitted because he had a seriously infected

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[9] These forms were submitted to the District Court only two days before the hearing on the Motion for Reconsideration, not giving Navos sufficient time to review the same, recognize the error, and point out the forms' deficiencies to the court. *See* Navos' "Motion to Strike Untimely Affidavits." R., Vol. I, pp. 1006–07.

ankle. In focusing on the multitude of standard forms pushed in front of his face in order to be admitted for treatment of his infected ankle, there was no serious reason for him to dwell on the question of whether he could look to BMH, or had to look elsewhere, for supervision and control of anesthesia services to be provided during surgery. Even if such a form had been presented, anesthesia services were not reasonably on Ellery's mind at the time. He just needed infection treatment that was not available outside a hospital.

Since BMH provided no proof that Ellery Navo had been given this form to review and sign on December 15, 2015, or more particularly once the decision was made several days later to perform surgery on his ankle, the "strict duty imposed upon the hospital through its employees and staff, including independent staff personnel, to exercise appropriate care to provide for the patient's well-being and to promote his cure" imposed by *Jones* still applied. There should be no assumption made about any information the hospital did or did not provide, particularly with regard to its support services. 147 Idaho at 115, 206 P.3d at 479. It was an error for the District Court to do so.

The only relevant consent form signed by Ellery Navo incident to the surgery that led to his death is the "Anesthesia and Procedure Consent Form" on BMH letterhead signed December 19, 2008, just minutes before the surgery from which he never awoke. R., Vol. I, p. 515. Nowhere in that BMH form was there any indication that the nurse anesthetists were not employees or agents of BMH. Id.

The Navos have provided sufficient evidence to support a reasonable belief by Ellery Navo that BMH was the direct provider of its highly-advertized support services, including

anesthesia services. In reply, BMH failed to provide relevant admissible evidence to counter this reasonable belief, especially in the context of a motion for summary judgment.

Even if the "Conditions of Admission" form were relevant and admissible, the District Court still erred in granting BMH summary judgment on the issue of apparent authority. The *Jones* decision does not itself address the question of whether such a consent form could absolve the hospital from vicarious liability for its support service providers. But there is authority in other states, that this Court can consider, that indicates that such a consent form is insufficient.

A decision by the North Carolina Court of Appeals is particularly on point. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 296-301, 628 S.E.2d 852, 858-64 (N.C.App. 2006). In *Diggs*, the court considered whether apparent authority applied to anesthesia support services provided at the defendant hospital. The court, following the Second Restatement of Torts, adopted a test similar to that adopted in Idaho:

> "When, however, a hospital does hold itself out as providing services, we believe the approach of the Restatement (Second) of Torts § 429 is consistent with our prior decisions considering apparent agency. We are also persuaded by the weight of authority from other jurisdictions. Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees."

Id. at 862.

The *Diggs* court further held that "A hospital may avoid liability by providing ***meaningful notice*** to a patient that care is being provided by an independent contractor." *Id.* (emphasis added). The question then turned on whether the consent forms provided to the patient, viewed in the totality of the circumstances, provided "meaningful notice" to the patient

that the support services were not being provided by the hospital. In so doing, the court first noted the lack of choice the patient had in choosing an anesthesia provider, and *with regard to the consent forms, it made a clear distinction between the physician providing the services and the support services*:

> "Plaintiff has submitted sufficient evidence to meet this test. The hospital had a Department of Anesthesiology with a Chief of Anesthesiology and a Medical Director, a fact that a jury could reasonably find indicated to the public that FMC was providing anesthesia services to its patients. Further, defendants chose to provide those services by contracting with Piedmont to provide anesthesia services to the hospital on an exclusive basis. Piedmont doctors served as the hospital's Chief of Anesthesiology and anesthesia Medical Director. As Dr. McConville put it, his group 'provide[d] the anesthesia services for the operating room at Forsyth and so there is—so our group covers the surgical caseload.' Plaintiff and other surgical patients had no choice as to who would provide anesthesia services for their operations.
>
> "Plaintiff's affidavit states that she was unaware that Dr. McConville and Ms. Crumb were not employees of the hospital. She explained, 'I did not select Sheila Crumb nor Dr. Joseph McConville to provide medical care to me; that in choosing to have my operation at Forsyth Medical Center, I relied on the fact that medical care would be provided by employees of Forsyth Medical Center, excluding my surgeon, Dr. Goco.' She further stated: '[O]ne of the reasons that I had my operation performed at Forsyth Medical Center was because it was part of Novant Health, a large healthcare organization . . . .'
>
> "In addition, *plaintiff pointed to the form on FMC letterhead that she signed entitled 'Consent to Operation and/or Other Procedures.*' The form specified: 'I therefore authorize *my physician,* his or her associates or assistants to perform such surgical procedures as they, in the exercise of their professional judgment, deem necessary and advisable.' (Emphasis added.) *By contrast, with respect to anesthesia services, the form stated: 'I authorize the administration of such anesthetics as may be necessary or advisable by the anesthetist/anesthesiologist responsible for this service and I request the administration of such anesthetics.*' (Emphasis added.) Finally, the form stated: 'I have had sufficient opportunity to discuss my condition and treatment *with my physician* and his or her associates and all of my questions have been answered to my satisfaction.' (Emphasis added.)

> This consent form stands in contrast to that provided to the patient in *Hoffman. A jury could decide based on this form that plaintiff was, through this form, requesting anesthesia services from FMC and that—given the distinction made between plaintiff's personal physician and the unnamed anesthesiologist—plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees.*

Id. 862–63 (emphasis added except where noted in text).

In this case, similar to the *Diggs* decision, a jury could construe that the language contained in the "Conditions of Admission Form" applies *only to* services provided by or under the direction of the physician, *and not* to support services. The specific language of the consent form entitled "LEGAL RELATIONSHIP BETWEEN HOSPITAL AND PHYSICIAN" itself suggests that unless "otherwise informed in writing" it only applies to "*physicians* furnishing services . . ." R., Vol. I, p. 966, § 6. In contrast, Section 1 of the form suggests that the hospital lists "anesthesia" as one of a multitude of distinct services it is providing, including but not limited to "laboratory procedures, radiology procedures, diagnostic procedures, sleep lab stress testing, medical, nursing or surgical treatment or procedures, anesthesia, pathology, emergency procedures, first surgical assistant or hospital services rendered to me under the general and special instructions of my physician." R., Vol I, p. 965, § 1. This form is also separate and distinct from the "Anesthesia and Procedure Consent Form" that Ellery Navo signed actually authorizing a specific nurse anesthetist to provide his anesthesia care. R., Vol. I, p. 950. Again, that form does not identify the nurse anesthetist as a non-employee or as an independent contractor of the hospital.

A jury could therefore find that these forms, and the language therein, could have caused Ellery Navo to reasonably distinguish anesthesia services that are provided by a non-employee "physician" from such services provided by a hospital employee. This is particularly true given

the fact that Mr. Navo signed a separate and distinct consent form specifically for the anesthesia services that *does not* identify the nurse anesthetist as a non-employee. Thus, notwithstanding the admission forms, this is a question that should go before the jury.

B. The District Court Had No Basis to Dismiss Navos' Claims for Not Pleading "Apparent Authority" as a "Cause of Action."

The District Court held that because "apparent authority" was not plead as "a cause of action" in Navos' complaint, Navos did not meet the liberal pleading requirements of IRCP § 8(a)(1). This decision by the Court is non-sensical and unreasonable.

Count One of Navos' Complaint states, in its first two paragraphs:

> 19. The ***defendants***, as providing health services to the public, owed the plaintiffs' decedent, Ellery Navo, and the plaintiffs, as heirs, a duty of care.
> 20. That duty of care required that the ***defendants and their agents*** failed to exercise their best medical judgment and render care consistent with the local standard of care.

R., Vol. I, p. 28.

All that is required under the Idaho Rules of Procedure for a proper complaint is for the plaintiffs to 1) provide a plain statement of the grounds of the court's jurisdiction, 2) a short and plain statement of the claim showing that the pleader is entitled to relief and 3) a demand for judgment for the relief to which (the plaintiff) deems he is entitled. IRCP § 8(a)(1) The Navos' complaint easily meets this basic "notice pleading" requirement. The Complaint simply claims that BMH provided health services along with the other defendants, and that the negligent performance of such duties by the hospital or its agents resulted in the wrongful death of Ellery Navo. Therefore, BMH had notice of Navos' claims, including the theories of the claim, i.e. wrongful death resulting from the defendants' or their agents' negligent care.

Because BMH never filed an answer to the Navos' Complaint, and because the issue of apparent authority was not raised in the initial summary judgment motions, the issue of apparent authority did not become relevant until after BMH filed a motion for summary judgment claiming that Sayre and Monroe, as nurse anesthetists, were not employees of the hospital and therefore not BMH's agents. R. Vol. I., pp. 4, 40–41. Prior to that time it was not necessary for the Navos to make the claim of apparent agency, since BMH had not enumerated any affirmative defenses to Navos' claims.

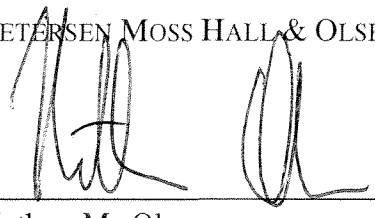
Navos had appropriately plead facts sufficient to raise a question of agency. Although it did not specifically plead "apparent authority," it is patently unreasonable to expect a plaintiff to anticipate all possible defenses to his or her allegations and to plead legal theories that refute those defenses *in the face of the complaint.* The District Court therefore abused its discretion by holding Navos to this extreme standard of pleading.

CONCLUSION

For all these reasons, this Court should reverse the District Court's decision to dismiss Navos' complaint against BMH and remand the case for further proceedings.

DATED this 3rd day of April, 2015.

PETERSEN MOSS HALL & OLSEN



Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 3rd day of April, 2015, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), I.R.C.P.

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